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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 35.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Brief for Defendant in Error on Petition for Rehearing under Order and Leave of the Court Made and Given on February 25, 1901.

Counsel for plaintiffs in error in their brief, on this petition for rehearing, on page 2, think it is of vital importance for this court to decide the other questions involved, as we could or might use the decisions of the supreme court of Mississippi in this case as *res adjudicata* in some other cases to which they refer in a foot-note. That appears to be fair

to them, and in the interest of fairness we now say that we are willing, and agree that the court may decide all four of the points involved in this case, all of which we will argue in this brief. They are:

1. The privilege taxes.

2. The ad valorem taxes.

3. The repeal of the exemption.

4. The unconstitutionality of the exemption.

But in joining in this request to the court we wish it to be distinctly understood that we do not waive or abandon the first and second points, but are willing for the court to also decide the third or fourth points, or both, as it may deem proper. We agree that such a course, under the peculiar circumstances of this case, would not, in our judgment, be improper. This we leave in the discretion of the court.

The matter now under consideration is the suit for the taxes of the year 1892.

It embraces two classes of taxes, the privilege and the ad valorem taxes. As the court will remember, there were several suits for taxes of different years, which were consolidated and tried together by written agreement, the material part of which is as follows:

"This order is made to save the expenses and inconvenience of separate pleadings, and trial in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved, which could be reserved, if said orders, proceedings and pleadings were separate."

Record, pp. 106, 610.

This is the first suit brought, and we hope the court will excuse us for making some tedious quotations. We wish to get the matter clearly and distinctly before the court. We will now take up the two different kinds of taxes separately, under the first and second points:

FIRST.

The Privilege Taxes.

This suit was brought on December 7, 1893 (Record, p. 1), and was brought under chapter 126 of the Mississippi Annotated Code 1892, for then the amendatory act of February 7, 1894, Laws 1894, p. 29 to 31, had not been passed. The material difference in these statutes in this case is that the act of 1894 authorizes the revenue agent to sue at any time after the taxes became delinquent, while said chapter 126 required him to wait till the fiscal year in which they were due had expired. In regard to said suit for the taxes of 1892, this latter provision was complied with, as, according to the contention of plaintiffs in error and section 115 of the constitution of 1890, the fiscal year began on October 1 and ended on September 30 of each year (Code of 1892, page 60).

We now desire to call the attention of this court to the privilege-tax laws, but let us first say that by a special provision both the privilege-tax laws and the "revenue," or *ad valorem*, tax laws were to take effect on April 2, 1892.

See Annotated Code of 1892, sections 12 and 16, pages 115, 116.

Section 3379 provides that "the railroad commission shall annually, on or before the first Monday in August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December."

Section 3401 provides that "any person other than insurance, telegraph, express and sleeping car companies, desiring to enjoy any of the privileges herein enumerated, shall first pay the tax as prescribed."

Section 3405 provides for two series of licenses, one to end with April 30 of each year, and the other for those issued "on or after the first day of May of each year," which latter class, of course, embraced railroad companies required to pay "on or before the first day of December."

Section 3408 provides that each license shall be dated "the first day of the month of its issuance, and it shall be good for one year from that date," and any person failing to pay this privilege tax "may be proceeded against by suit for such tax."

From all which it is plain that the privilege tax due December 1, 1892, was for the privilege of doing the business of a railroad for the period of one year from that date.

The consolidation occurred on October 24, 1892, and the new corporation, the *new* Yazoo and Mississippi Valley Railroad Company, became liable to pay this privilege tax on December 1, 1892, for the privilege of doing business for the year December 1, 1892, to December 1, 1893.

As will be noticed in the declaration, we sued for two privilege taxes. That was on account of the provision in section 3409 of said Annotated Code that "the license herein provided for shall be a personal privilege, enjoyable only

by the person to whom it is issued, and it shall not be transferable" (161 U. S., p. 180).

Under this provision we thought that a privilege tax was due for the year preceding October or December 1, 1892, because we had alleged in the declaration that the railroad was purchased by the Illinois Central Railroad Company on or about July 21, 1892.

Record, p. 5.

On the trial the court instructed the jury, at the request of the defendants, the present plaintiffs in error, as follows:

"5th. The court instructs the jury that they must find for the defendants so far as one-half of the privilege taxes are concerned, which are described in the declaration, as payable for the year 1892."

Record, p. 117.

As there was no express law which authorized a levy of privilege taxes as such previous to December 1, 1892, we assented to this ruling of the court, and in the final judgment of July 8, 1898, we did not ask or take any judgment for privilege taxes for any period antedating December 1, 1892. The declaration does divide the periods as commencing October 1st; but this was a clear mistake, and no objection has ever been made to this formal error anywhere. The substantive thing is that under the declaration for taxes of 1892 we only took judgment FOR ONE PERIOD, and that was for the period commencing December 1, 1892, which was for the period after the consolidation of October 24, 1892.

For illustration, take De Soto county, in the final judgment in the record, on page 630. The judgment for privilege taxes in the five suits is, in the aggregate, $1,543.80.

Now, the privilege tax in the first declaration for the year due December 1, 1892, is $257.40; in the second declaration, embracing two years, it is, for period commencing December 1, 1893, the sum of $257.26, and the same for 1894. In the third and fourth declarations it is the same, and in the fifth it is $257.36. By adding these sums, four times $257.26 and $257.40 and $257.36 together, it will be seen that they make the aggregate of $1,543.80, recovered, and that there was no recovery for any privilege taxes previous to those due December 1, 1892, for the year December 1, 1892, to December 1, 1893, all after the consolidation of October 24, 1892. And so for all the counties.

Record, pp. 6, 77, 103, 614, 626, 630.

So in this connection it is not necessary to make any point of the alleged purchase of the property by the Illinois Central Railroad Company on July 21, 1892.

We will argue that phase of it under the head of *ad valorem* taxes.

In dealing with this case it can be distinguished as original case No. 2788. That was its number. There were other subsequent suits brought, and they were all successively consolidated with this one, and all proceeded under its number, 2788. So it is original No. 2788.

Record, p. 610.

There were no privilege taxes proper until prescribed by section 3379 of the Code of 1892, to take effect as to railroads on December 1, 1892. Previous to that it was called privilege taxes, but were what we and the court below and this court call commutation taxes. In their brief opposite counsel seem to abandon all contention as to the privilege taxes

proper and confine their argument to the ad valorem taxes. But here we wish to call the attention of this court to the fact that in their brief opposite counsel misconstrue the language of this court in its opinion, and treat *commutation taxes* as referring to what they have heretofore called "an appropriation of taxes" as in some manner recognizing that there was a distinction between a pure exemption and the form of exemption embraced in their charter, while we claim and show hereafter that where the word "commutation taxes" is used by this court it refers to the so-called privilege taxes, in lieu of *ad valorem* taxes, and *nothing else*.

SECOND.

The Ad Valorem Taxes.

It is important here for the court to have a clear understanding of the facts. The declaration for the taxes of 1892 is different from all the other declarations, and was prepared specially to meet the objections now interposed. We ask the court to bear this particularly in mind, while we now quote in full the material parts of this first declaration. They are as follows:

"For that whereas heretofore, to wit, during the year 1892 the railroads and property of the Louisville, New Orleans & Texas Railway Company, a corporation authorized under the laws of the State of Mississippi, under an act entitled 'An act to amend an act entitled An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company to effect a consolidation, approved March 3rd, 1882,' approved March 15th, 1884, and created by a consolidation of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad

Company, a Mississippi corporation created under an act entitled 'An act to incorporate the New Orleans, Baton Rouge, Vicksburg & Memphis Short Line Railroad Company,' approved March 9th, 1882; the Memphis & Vicksburg Railroad Company, a Mississippi corporation, created under an act entitled 'An act to incorporate the Memphis & Vicksburg Railroad Company,' approved August 8th, 1870; the Tennessee Southern Railroad Company, a Tennessee corporation, and the New Orleans & Mississippi Valley Railroad Company, a Louisiana corporation, under an act or deed of consolidation made and executed on or about August 12th, 1884, was duly assessed for taxation in said State of Mississippi, under its laws, by its Mississippi railroad commission, the said assessment being completed, after objections heard, on September 22nd, 1892, and was also by said commission duly classified for privilege taxation under said laws." * * *

Record, p. 2.

"And whereas on or about July 21st, 1892, all the railroads and property of the said Louisville, New Orleans & Texas Railroad Company was purchased by said Illinois Central Railroad Company;

"And whereas on or about October 25th, 1892, the said Illinois Central Railroad Company turned over, delivered to and merged all said property and railroads of said Louisville, New Orleans & Texas Railway Company with the railroad system and property of said Yazoo & Mississippi Valley Railroad Company, which it then and there also owned and controlled, and the said Louisville, New Orleans & Texas Railway Company then and there surrendered its franchise, and then and there became extinct and ceased to exist as a corporation;

"And whereas the said Yazoo & Mississippi Valley Railroad Company, under the direction and control of the said Illinois Central Railroad Company, then and there in

said October, 1892, began and have since continued operating all said railroads and railroad system of said Louisville, New Orleans & Texas Railway Company in said State, and by virtue and reason thereof have become liable to pay a new privilege tax thereon from said October 1st, 1892;

"And whereas the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company by taking said property and railroad of said Louisville, New Orleans & Texas Railway Company, became liable for its debts and obligations and liabilities, and did in fact agree to, and did assume and promise to pay all said debts, obligations and liabilities of whatever kind or character;

"Whereby and by force of the which foregoing laws, acts, and agreements, the said Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company have become and are indebted to the said State of Mississippi and said several counties for privilege and CURRENT State and county taxes." * * *

Record, pp. 5, 6.

Notice the word "*current*" last above, which we have underscored.

And turn to section 3748 of the Mississippi Annotated Code of 1892. It says: "All taxable property brought into the State or acquired or held by any person before the first day of February shall be assessed, and taxes thereon paid for the current year," not the next fiscal year.

Hence, if the Yazoo and Mississippi Valley and Illinois Central Railroad Companies had acquired and held this property *before the first day of February*, 1893, they were liable for the taxes for the fiscal year October 1, 1892, to October 1, 1893. The statute seems to fix a dividing line at February 1. If property is acquired or is exempt after February 1,

then it is free from taxation, for from one to eight months, until after October 1, but if it is acquired or the exemption expires before February 1, being more than eight months, or two-thirds of the year, and sometimes even a whole year, less one day (for it may be acquired or exemption expire on October 2), then the policy of the law seems to be that it shall be assessed and taxes paid on it for the current year; otherwise there might be a total exemption for a whole year, less one day, to which the property is neither entitled in law or equity. The statute might well have provided for a proportional tax for the unexpired part of the year, after October 1, but that would be cumbersome and uncertain, and, instead of that, a date has been fixed as nearly just and equitable as possible.

This is shown by section 3799, which provides:

"In case of the destruction or deterioration in value of any real estate by any casualty, or in any case of any overvaluation known to be such, or in case of clerical error in the assessment-rolls, or in case of a change in the ownership after assessment, or in case of an increase of value by the erection of improvements, the board of supervisors shall have power at any time, on the application of a party interested, or otherwise, to change the assessment so as to reduce it or increase it to the true value of the property, or to cause the taxes to be charged to the purchaser thereof."

By section 3804 it is provided that "the collector shall assess and collect taxes on land liable to taxation left unassessed by the assessor, and on land that has become liable to taxation since the last assessment, and he shall also assess such other persons and personal property as he may find unassessed by the assessor."

Section 3870, in regard to transient merchants, traders, etc., provides if any such apply for a privilege license "after the time for assessing taxes, the collector shall assess the regular ad valorem tax levied on other property in the county, and report the assessment at once to the clerk of the board of supervisors for entry on the assessment-rolls. If the time for collecting taxes has arrived, the collector shall collect the ad valorem tax."

In this case there is no question made of any proportional rate of tax; if such a point had been raised, it would no doubt have been considered by the court, and under certain circumstances might have raised a Federal question.

In another case, involving the same principle, certain parties got to withdrawing their deposits out of the various banks a day or two before the time fixed for the tax to take effect or assessment to be made and placing them back on special deposits in sealed envelopes, in greenbacks, which were not taxable, and after the date had passed would withdraw the special deposit of greenbacks and again make a general deposit. Among others the State of Ohio passed a law making the property assessable at any time and levying a proportional or average tax on all property-owners during the year. This court decided that such conduct on the part of tax-payers was a fraud on the revenue of the State, but also decided that the proportional and average taxes were just and equitable.

It also says:

"It is to be conceded that a State may make the ownership of property subject to taxation relate to any day or days or period of the year it may think proper, and that the selections of a particular day on which returns are to be made

by the tax-payers of the property for the purpose of assessment does not necessarily preclude the making of assessments as of other periods of the year."

Shotwell *vs.* Moore, 129 U. S., 597 to 600.

To the same effect:

C. N. Nelson Lumber Co. *vs.* Town, &c., 22 Fed. R., 54.

But no point of this kind was made in this case. It is not anywhere set up or claimed under their theory that the tax which they say was due on October 1, 1892, is more than their proportional part of the tax for a year, or that the State did not have a right to fix a period antecedent to February 1 as the date of ownership on which taxes could be levied and collected for the current year; and this court has frequently decided that when a case is brought here on a writ of error to a State court on one Federal question it has no jurisdiction to decide and will not decide other Federal questions which were not raised and passed on in the State court.

Dewey *vs.* Des Moines, 173 U. S., 198 to 199.

"In the case at bar, no claim was made in the State court that the assessment was invalid, or in violation of any provision of the Federal Constitution" (*ib.*, p. 199).

"For the same reason, the contention as to whether the bridge was assessed at more than its value, and not at same proportion of its value as other property was, need not be considered."

Keokuk *vs.* Illinois, 175 U. S., 632–634.

To the same effect:

Citizens' Saving Bank *vs.* Owensboro, 173 U. S., 642–644.

Bolin *vs.* Nebraska, 176 U. S., 83, 92.

Cincinnati *vs.* Thiebaud, 177 U. S., 617, 620.

Now, as to railroad property, under section 3881, the railroad commission is required to meet on the first Monday of July of each year to hear and consider objections to assessments, and under section 3882, "so soon as the assessment-rolls have remained subject to objection for one month, and when all objections, if any, are disposed of, the assessment-rolls shall be approved either by order of the railroad commission, or by operation of law, and the same shall be sent to the clerks of the boards of supervisors of the respective counties, who shall file and preserve the same as a record," thus showing, as we contended, that the action of the railroad commission in assessing the property after objections heard was a judicial act and conclusive as to its liability to taxation, unless corrected by certiorari under section 90 of the Code.

See our brief in Railroad Co. *vs.* Adams, 77 Miss., p. 208, and more fully as to back taxes in Railroad *vs.* Adams, 77 Miss., 772 to 774.

The argument as to this in the brief of opposite counsel is not reported, the reporter stating that their brief was embraced in 367 printed pages.

See 77 Miss., 237.

We, however, file herewith a copy of this long brief, and, if this court feels so disposed, it can examine pages 118 to 129

of that brief, referred to by the State court, and see that opposite counsel met our argument that the decision of the railroad commission was a judicial act, and not assailable collaterally, by a long and ingenious counter-argument, *and admission* that under the peculiar terms of their charter an assessment was necessary in order to determine the amount of taxes they would have to apply to construction debts; and they never did claim in this case before the supreme court of Mississippi that the assessment on September 22, 1892, was irregular or improper, but, on the contrary, expressly claimed and insisted that it was both regular and proper, in order to escape from a decision that the decision of the railroad commission was judicial and *res adjudicata*, and it is a principle too well settled to need citation of authorities that a person will not be permitted to blow hot and cold at the same time. He is estopped from assuming inconsistent positions, and they cannot be permitted to come up here now and claim that the assessment was wrong.

See also their plea in Record in No. 355, pp. 195, 196.

In ordinary cases the revenue agent, if no assessment had been made, could have had one made either under section 4192 of the Code or the amendatory revenue agent act of February 7, 1894.

Mississippi Laws of 1894, p. 30, sec. 4.

In this latter case the assessment would have been *res adjudicata*, as held in 77 Miss., 764.

But there never was any dispute on either side that the assessment by the railroad commission on September 22,

1892, was regular and proper. The only dispute was as to the effect of it. We contended that it was judicial and conclusively established the liability of the property to money taxation. They contended that it was necessary, but that it left the question open as to whether they would have to pay in money or could pay by affidavit of appropriation to construction debts under their charter. Now as to the pleadings and record. In their plea to the first declaration, Record, page 55, in paragraph 3, they allege that the charter affidavits were made and receipts obtained *by the said Yazoo and Mississippi Valley* Railroad Company. This was necessarily after the consolidation, for the "said Yazoo and Mississippi Valley Railroad Company" did not exist till after the consolidation of October 24, 1892. There was no denial or complaint made of the assessment of September 22, 1892.

Plaintiffs' eighth replication set up that the decision of the railroad commission was *res adjudicata*. This was demurred to and demurrer sustained.

Record, pp. 59, 84, 87.

Plaintiff asked an instruction to the jury that the decision of the railroad commission was *res adjudicata* in his sixteenth instruction requested.

This was refused.

Record, p. 115.

The plaintiff's bill of exceptions shows the proof of the assessment-rolls by the acting clerk of the railroad commission, W. M. Massie, and their introduction in evidence on the trial (Record, pp. 126 to 130), and the only objection was that they did not reasonably tend to show what the

railroad cost and were not the best evidence on this point. They were not objected to as *an assessment for taxation*, but as evidence of cost of construction.

Record, p. 130.

The same objection was made in the defendant's bill of exceptions.

Record, pp. 492 and 495.

In the agreement as to what the State supreme court record should contain it was agreed to leave out these assessment-rolls and also the affidavits and sheriffs' receipts. (See items 3 and 9.)

Record, p. 503.

And in the agreement as to what the record for this court should embrace it was agreed to omit the assessment-rolls and objections made to the assessment IN *1892*. (See items 1 and 4.)

Record, p. 696.

In the defendant's motion for a new trial the only objection against the admission of the assessment-rolls was that they were not competent evidence of value as to the cost of the road, the construction debts. (See item 1.)

Record, p. 121.

In their suggestion of errors, after the decision of the State supreme court, not one word is raised against the assessment for 1892 nor why it should be differentiated from the other years.

Record, pp. 518–527.

In the second plea, which was not stricken out, but withdrawn, it is distinctly stated that "the said Yazoo and Mississippi Valley Railroad Company" made the appropriation of taxes, delivered the affidavits, and received the receipts of the sheriffs.

Record, p. 553.

The same is true of the third, fourth, and fifth pleas, which were stricken out.

Record, pp. 556, 568, 571 to 572.

And in the sixth plea, which was also stricken out, it is expressly stated this was done "after such consolidation."

Record, p. 576.

If this were not all affirmatively shown, it would be presumed against the pleader, when the pleadings do not show that it was done before the consolidation, and when by express written agreement the assessment-rolls and the affidavits and sheriffs' receipts are left out of this record.

Stephen *vs.* Beall, 22 Wall., 329.

Under the charter the affidavit was required to state "that the amount of the taxes has actually and in good faith been paid and applied during the year" in the payment of the debts, etc.

Record, pp. 40, 41.

Under section 3801 of the Code of 1892 the collector could not even receive the taxes until receipt of the assessment-rolls, and they were not due and delinquent till December 15. Under section 3794 (*a*) the clerk of the board of super-

visors was required to deliver a copy of the assessment-rolls to the tax collector "on or before the first Monday of October," but he was at the same time to send another copy to the auditor of public accounts.

Under section 3795 the auditor was required to examine the assessment-rolls, and, if found incorrect, return them to the board of supervisors for correction, and the assessment was not final until the certificate of the auditor was entered on their minutes, which might take till December 15.

Of course, the board of supervisors had nothing to do with the assessment of railroads, but their clerk was required to perform the same duties as to railroad assessments as he was required to do in reference to county assessments, and so with the tax collectors.

Annotated Code 1892, secs. 3883 and 3884.

We have been thus particular in order to show that the taxes were not really due until December 15, 1892, and there was no obligation or duty to make any appropriation of taxes, or any affidavit, or to obtain any sheriff's receipt until that time. It could not be told until then whether the profits of the year would pay the dividends. Suppose there had been no consolidation, and suppose that on December 15, 1892, *during the year 1892*, there had been a return made or an accounting which had then developed the fact that the profits were sufficient to more than pay the dividend, then certainly the affidavit would not have been receivable under either the terms or language of the charter. This shows conclusively that the assessment, so far as the current taxes are concerned, neither fixes or unfixes the liability to pay, especially when the court refused to treat

the assessment for current taxes as *res adjudicata* on that point. Under the ruling of the court, and also, as above shown, under the contention of these plaintiffs in error, the assessment merely placed the property in a condition to show the amount of taxes due on it, and then the question as to whether the taxes were to be paid in money or by affidavit would depend on whether the profits *during the year* had been actually and in good faith paid on construction debts, and whether there was a sufficient balance left to pay a dividend of 8 per cent. on the stock. The charter and the statute must be made to harmonize. It would be entirely unreasonable to hold that the railroad company could make the appropriation at any time it chose, as virtually contended by opposite counsel on page 4 to 5 of their brief.

Under this theory the railroad company could apply the profits of January or any other short period of one, two, or three months, and not account for the profits for the balance of the year at all. On the contrary, we think that it is manifest that they could not make the appropriation until they were *forced* by law either to do this or to pay the taxes in money, and that was on December 15.

Even on that construction they would get the benefit of sixteen days to January 1 of the next succeeding year, and hence, under the terms of their charter, as they were required to appropriate the taxes *during the year*, it is very probable that they could not be compelled to make the appropriation or the affidavit until the last day of the year. This is the time allowed by their charter. It is the profits during the year, and it could not in the nature of things be definitely known what the profits for the year were until the end of the year; but if we were to concede that the State, by

authorizing summary proceedings to collect the taxes after December 15, had the power to waive and did waive any calculation of profits for the balance of the year, and if on December 15, 1892, it was found that the profits during the year would enable the company to pay the dividends, then it is clear that the property would be liable for a money tax, and that the necessary exemption affidavit could not be truthfully made. So, if at the time the tax accrued it was impossible for any reason brought on by the voluntary act of the company to make the affidavit, the taxes would have to be paid in money. The affidavit was a *sine qua non* and was required to be made by the president or cashier of the company.

At that time there was no Louisville, New Orleans and Texas Railway Company in existence, and no president or cashier of said company, and hence no one authorized to make any appropriation or any affidavits or obtain any receipts for said company. It falls exactly within the principle laid down in R. R. Co. *vs.* Maine, 96 U. S., 499.

This was a construction by the highest court of the State of its own tax laws, of the time at which the taxes accrued, and that they did not accrue until after the consolidation. The court says (Record, p. 68; 77 Miss., 316) that the taxes did not accrue until after the consolidation on October 24, 1892. This decision and finding is binding on this court.

Rice *vs.* Jerome, 97 Fed. R., 719.

Haley *vs.* Broad, &c., 94 Fed. R., 299 to 300.

Secor *vs.* Singleton, 9 Fed. R., 809.

Parks *vs.* Watson, 20 Fed. R., 764.

Hodgdon *vs.* Burleigh, 4 Fed. R., 128.

Raymond *vs.* Longworth, 14 How., 76 to 78.

Louisville, &c., *vs.* Mississippi, 133 U. S., 587.
N. Y. Life Insurance Co. *vs.* Cravens, 178 U. S., 395.
Bailey *vs.* Maguire, 22 Wall., 230 to 231.
Union Pac. R. R. Co. *vs.* Cheyenne, 113 U. S., 516.

And such findings of facts are not reviewable by this court.

L. & N. R. R. Co. *vs.* Schmidt, 177 U. S., 237.
Keokuk, &c., *vs.* Illinois, 175 U. S., 631 to 632.

We have not adverted to the fact that the declaration for the taxes of 1892, *supra*, distinctly alleges that this property was purchased by the Illinois Central Railroad Company on or about July 21, 1892, and that at the time of the assessment on September 22, 1892, the pretended exemption had been lost by said purchase. (See authorities collected in Phœnix Ins. Co. *vs.* Tenn., 161 U. S., 180, 181.)

It is true the defendants denied this in their pleas (Record, pp. 54 and 55), but they voluntarily withdrew these pleas, and this court decides that it cannot review the action of the court below in striking out their other pleas.

In the former opinion this court decided the case on the declarations and with all the pleas either withdrawn or stricken out, which, of course, was giving the declarations their full force and effect, and deciding on the facts shown by the declarations themselves. In fact the court, on page 9 of 180 U. S. R., says:

"The original declaration averred the several consolidations by which the defendant companies were formed; the assessment of the same for taxation by the railroad commission; a copy of the assessment by counties; and the refusal

to pay. Annexed thereto as exhibits were copies of the various charters and contracts of consolidation."

The court took the declarations as true. Now, this declaration for the taxes of 1892 is totally and entirely different from the others, in that it alleges that the property was purchased by the Illinois Central Railroad Company on or about July 21, 1892, and this allegation was made with the distinct purpose of meeting and obviating any possible objection to the validity of the taxes for 1892.

As we before said, this court in its former opinion treated the case with all the pleas out, either by the action of the court below or of the parties themselves; but the court is now asked to go a step further, and, notwithstanding there are no pleas in, to consider the declaration as absolutely false. How is this court to do such a thing as that? It could disregard the pleas and decide the case on the face of the declarations, but how is it to decide a case without any pleas *or any declaration either?*

We submit that the only course left is to follow the State supreme court, and hold that the exemption for 1892 was lost by the consolidation in common with the other years, or else, if this case can be differentiated from the others, then to hold that on the face of the declaration for the taxes of 1892 this case, original No. 2788, must be dismissed for want of jurisdiction, the pleas all being out, and hence there being no denial of the fact of the sale on July 21, 1892.

THIRD.

The Repeal.

The State supreme court in the full opinions filed November 22, 1898, treats of this subject of repeal.

Record, p. 671 to 673.

77 Miss., p. 289 to 293.

In the concluding part of its opinion on this point, in Record, p. 673, and 77 Miss., 293, the court holds:

"So that we hold that certainly since the Code 1892 went into effect, and as we think since the act 1886, the exemptions set up by the railroad company in this case, were repealed by the legislature, and on this ground, independently of any other ground heretofore set out, the exemption must be denied."

This is adhered to in the decision in the last and final appeal (Record, p. 687; 77 Miss., 318).

The privilege-tax laws and the revenue laws, under the statute putting the Code of 1892 in force (see Annotated Code of 1892, pages 113 to 116), in section 12, on page 115, were to "take effect and be in force from and after the passage of this act," which, as shown on page 116, was April 2, 1892, all before the date set for any assessments. But the court had as much right to decide that the exemption was repealed by the section 6, page 23, of the Acts of 1886, as it did do, as to hold that it was repealed by the Code of 1892. The one decision might be right and the other a wrong construction, but it would be a simple mistake in judgment, the power and right to decide being the same in both cases.

The decision of the State court as to whether the exemption was repealed or not is a question of local law, and is binding and conclusive on this court if the legislature had the power to repeal. In this case, as above shown, the court did definitely and positively and as an independent ground decide that the exemption had been repealed.

The only question, then, is, did the legislature have the power to repeal it?

The attorneys on the other side have here persistently endeavored to make a distinction between an ordinary exemption from taxation and the peculiar provisions of section 5 (21) of their charter, claiming that theirs was not an exemption, but a donation or appropriation of taxes. We have argued that point in our different briefs in this case and in No. 355, for the taxes on this same property for the year 1898, and in our briefs in Nos. 78 and 79, on appeal from the Federal circuit court in Mississippi, and do not think it necessary or proper to enter into another discussion of it here. We do not think it necessary, for in our last brief on the merits in this case filed in October last, being our "supplemental brief for defendant in error and in reply to supplemental reply brief of plaintiffs in error," on pages 12 to 15 we have copied the exemption or appropriation of taxes provision, and also that in the Mississippi Mills case, and placed them in juxtaposition, in order to show that in so far as the claim that this is an appropriation of taxes, as distinguished from an exemption, there is no substantial or material difference, and argued that phase fully on pages 9–17.

And we think it is not proper to reargue that point, because this court in its opinion in this case, in 180 U. S. R.,

pages 1 to 25, has expressly called and uniformly treated it as an exemption, notwithstanding the contention of opposite counsel. In that opinion, on pages 5, 6, 13, 15, 16, 22, and 23, it is called either exemption or alleged exemption, and we think it would be improper for us to again discuss that point, at least, unless under a *curia vult* from this court.

Hence we will treat it as and call it exemption. Now, in its said opinion, on pages 12 to 13, this court says: "The railroad companies went to a trial of these cases in an obvious reliance upon two previous decisions of the supreme court of Mississippi," and these are there designated as Mississippi Mills *vs.* Cook, 56 Miss., 40, and Railroad Company *vs.* Lambert, 70 Miss., 779.

Although the Lambert case, 70 Miss., 786 to 787, expressly decides that the appropriation form is "*a thin disguise*," and that in truth and in law *it is an exemption from taxation*, and although, on page 787, it says, "It was in the power of the legislature at any time to annul the agreement contained in the twenty-first section aforesaid," we will leave that out of the present argument, because that decision was made in 1893, after the taxes for 1892 in controversy had accrued. We will also leave out of consideration the decision in Attala County *vs.* Kelley, 68 Miss., on page 44, that "the most that can be claimed is that the act allowed an exemption from taxation, and it is well settled that, even when this is done by a charter, it is repealable by a subsequent legislature (Cook *vs.* Mississippi Mills, 56 Miss., 40)," because this decision was made at the October term, 1890, after the charter in this case had been granted, but certainly before the consolidation of October 24, 1892. We will leave all that out as unnecessary for present purposes and see what great case

the plaintiffs in error themselves state that they relied on. The first mention of it occurs in their suggestion of errors to the decision of the State supreme court. In it they say:

"At the April term, 1878, twenty years ago, this court decided the celebrated case of The Mississippi Mills *vs.* Cook, which in its present decision the court now undertakes to overrule. In that case it was determined that section 13 of article 12 above quoted, did not mean that the property of corporations should be taxed, and it did not mean to announce the abstract proposition that such property was taxable, but that it did mean and meant only that such property should always remain subject to the power of the legislature to impose taxes on it, and such power could not be contracted away, but that exemption might be granted, subject always to the power of the legislature to repeal such exemption at any time it saw proper."

Record, p. 519.

Proceeding, on page 525, this suggestion of errors says:

"It is no answer to the foregoing propositions to say that the Mississippi Mills case itself held that the 'exemption' was revocable. That is true, but it is essentially a different thing. The decision was that an exemption could be revoked by the legislature, and the legislature has never revoked it. It was never contemplated that the thing could or would be done by a judicial decision, which the chief justice calls 'legislation,' retroactive over twenty years, and subverting millions upon millions of property rights which had vested under the law as declared."

It is an awfully funny thing that the plaintiffs in error should in this suggestion of errors, on pages 525 and 526, make this charge against the court: "The Lambert case was decided in March term, 1893, and now, after the lapse of

more than five years, this court proposes to overrule that also. Is it not a rule of property?" * * * And: "But now overgoes the Lambert case after five years and a new phase is given to the whole matter," when we commenced this suit on *December 7, 1893*, the earliest period allowed by law, only a few months after the Lambert case, and "the lapse of more than five years" was caused by the persistent and almost unprecedented Fabian tactics of the eminent and learned counsel for the plaintiffs in error.

The same remarkably curious and funny indictment occurs in the stricken-out fourth plea (Record, page 564), wherein it is charged that said Yazoo and Mississippi Valley Railroad Company during said five years made many contracts and incurred numerous obligations, and had on hand ample funds to have paid off all said taxes and had a big surplus left. And therefore they are innocent purchasers!

Oh, ye shades of Great Moses, Wise Solomon, Mighty Nimrod, Patient Job, Wandering Salathiel, Descriptive Shakespeare, Measuring Bertillon!!! That is, as soon as Bertillon has acquired himself a shade.

In their fourth plea (Record, page 558 to 559) they say:

"That at the April term, 1878, the supreme court of said State decided the case reported in the 56 volume of Mississippi Reports, under the style of Mississippi Mills *vs.* Cook, tax collector, in which it was determined that the said provision of the constitution of 1869, set forth above, did not require that the property of corporations for pecuniary profit should be taxed, but only meant that such property should remain subject to taxation at the will of the legislature of the State; that no legislature could, by contract or privilege of exemption thereafter made, place such property beyond the taxing power of any succeeding legislature, or of itself,

but that such contract or privilege could, when thereafter granted by any legislature, be repealed by any legislature.

"That such decision, rendered twenty years ago, has remained unchallenged and unmodified until the 20th day of June, 1898; * * * being the settled and unquestioned law of the State ever since its making."

Again: "On the faith of the decision in the Mississippi Mills case aforesaid," etc., the Yazoo and Mississippi Valley Railroad Company executed certain bonds.

Record, p. 563.

In their sixth plea (Record, page 574) they say:

"At the April term, 1878, of the supreme court of the State of Mississippi, that court decided a certain cause, since widely known amongst the members of the bar of said State as the Mississippi Mills case, in which was litigated and determined the meaning of the foregoing provisions in said constitution of 1869, and by that decision, the said supreme court announced and declared the true meaning of said provision to be, (1) not a mere declaration that corporate property should be liable to be taxed the same as that of individuals, and (2) not a declaration that it should be actually subjected to such taxation, so that the legislature was denied the power to grant exemptions as heretofore, but (3) that the legislature should not thereafter have the power to make grants or exemptions which should be contracts irrepealable by subsequent legislatures, and that the matter of corporate taxation should always be controlled by the legislatures successively.

"This decision, rendered twenty years ago, has remained unchallenged and unmodified until now." * * *

Further on, on page 576, it is said:

"But the said legislatures of said State met each such

effort by a continuous and persistent refusal to repeal the same, and allowed the same to stand unrepealed, and the same does stand unrepealed by the legislature to this day," etc.

This court has decided that the exemption was repealable, and we have taken this great pains to show that the defendants, plaintiffs in error here, have not only not denied, but have themselves strenuously asserted and maintained what is the truth—that the Mississippi Mills case settled the law in the State of Mississippi to be that all exemptions to corporations for pecuniary profits were repealable at the will of the legislature. This is incontrovertible from a perusal of the Mississippi Mills case itself.

In addition to this, it has been admitted in the briefs of opposite counsel all through the litigation that the Mississippi Mills case decided that all exemptions from taxation were repealable at the will of the legislature, and they distinctly admit it in their last brief on this petition made on March 16, 1901, on pages 6, 13, and 22.

On page 19 they again bring in a charge of bad faith and repudiation which we do not think is exactly in good taste, after this court has expressed its opinion on that subject in this case in 180 U. S., p. 24 to 25. But in order to set those high-sounding phrases at rest we will here quote some former expressions of this court on that subject.

Where Congress had a right to repeal exemptions to manufacturing companies, and did repeal the same, about one year after a party had built a very extensive plant on the faith of said exemptions, this court says that while it was a great hardship, yet he was charged with the knowledge at the time he accepted the exemption that it was liable

to be revoked at the will of Congress, and hence the court says: "Nor are we able to see that this action involves any breach of faith towards the owner of this manufacturing property." That exemption was for ten years.

Welch *vs.* Cook, 97 U. S., 541 to 545.

In the case at bar the exemption was for thirty years; but this court has decided that the fact that an exemption is granted for ten or thirty or any specified number of years is not an agreement not to repeal it within the time limited.

Citizens' Saving Bank *vs.* Owensboro, 173 U. S., 650.

Louisville *vs.* Bank of Louisville, 174 U. S., 443 to 444.

In regard to the repeal, it will be seen that the true contention of the plaintiffs in error in the court below is contained in their allegation on page 576 of the record above quoted, "and the same does stand unrepealed by the legislature to this day."

Whether it does stand so unrepealed or not was a question submitted to and determined by the supreme court of Mississippi—a question of the proper construction of its own statutes, which this court ought not to review, and has often decided that it cannot review. This court says:

"Whether or not an act, prescribing such particular mode, has been repealed by a general revenue act not in terms repealing it, is a matter peculiarly within the province of the highest courts of the State to decide—and when such courts have decided the question, their decision is controlling."

Bailey *vs.* Maquiro, 22 Wall., 215 to 216.

In another case this court says:

"The supreme court of Tennessee held in the case before us, that the statute repeals and overrides the ordinance of exemption, and brings the bonds within the scope of general taxation. This is a decision by a State tribunal upon the construction of its own statutes, which we are bound to respect."

Adams *vs.* Nashville, 95 U. S., 19–21.

In order not to worry the court, we will now close this head by quoting from the latest decision of this court on this subject. It is a case where the supreme court of Texas had overruled some of its former opinions. This court says:

"This was a question either of local law or of general law. If of local law, of course the decision of the supreme court of Texas is binding upon us. If of general law, as it involved no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that if the question had arisen on appeal from a circuit court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court, whose opinion upon a question of general law is not reviewable here."

Avery *vs.* Popper, 179 U. S., 305 to 315.
Also, Board & Co. *vs.* Louisiana, 179 U. S., 636.
Central Land Co. *vs.* Laidley, 159 U. S., 109 to 112.

FOURTH.

The Exemption Unconstitutional.

Opposing counsel, in our opinion, have not given a fair or just construction of the opinion of the Mississippi supreme court in the case of Wirt Adams, State revenue agent, *vs*, Tombigbee Mills, a copy of which they have filed with their brief on this petition. By a perusal of said opinion it will be seen that the Mississippi supreme court did not decide that exemptions to corporations were valid, even if the law was a general law, and extended to all corporations of the same class. What they did in fact decide was that the legislature might exempt, for the time being, property of a certain kind, whether it belonged to corporations or individuals, but that there could be no distinction between corporations and individuals, and that any law which granted exemptions to corporations by name, or as such, and which did not embrace individuals, was invalid.

In fact the supreme court of Mississippi and this court have always been in exact accord on this subject, and the only trouble is that the corporations have either innocently or deliberately misconstrued the Mississippi Mills case. We would have it distinctly understood that the charter in this case was granted and accepted under the act of March 3, 1882, as amended by the act of March 15, 1884, and that the Louisville, New Orleans and Texas Railway Company was formed under said acts on August 12, 1884.

Record, pp. 12, 43, 44.

At that time there had been no decision under the constitution of 1869 except the Mississippi Mills case. In making

the decision in the Mississippi Mills case at the April term, 1878, the Mississippi supreme court evidently overlooked a decision of this court in the case of Salt Co. *vs.* E. Saginaw, in 13 Wall., p. 373.

On page 376 to 377 Mr. Justice Bradley says:

"Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision, that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract."

On page 378 this court makes the following observations:

"This case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts." "Charters granted to private corporations are held to be contracts." "The act under consideration cannot be interpreted on this principle, it applies to individuals as well as to corporations."

And for this reason this court held it to be repealable at the will of the legislature.

In conclusion, on page 379, this court says:

"In short the law does not in our judgment belong to that class of laws, which can be denominated contracts, except so far as they have been actually executed and complied with.

"There is no stipulation expressed or implied, that it shall not be repealed. General encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties or drawbacks or any other advantage are always under the legislative control."

This was the exact decision in the Mississippi Mills case, and on the ground that an exemption granted in this class of cases to factories was not forbidden by the constitution of 1869, because the same was repealable at the will of the legislature; but the court went on to say, in said case of Mississippi Mills *vs.* Cook, 56 Miss., 62:

"If the exemption is granted in the form of a contract in the charter, that is prohibited."

In another case, decided by this court at the October term, 1878, shortly after the Mississippi Mills case, the Legislative Assembly of the District of Columbia, on June 26, 1873, under authority of an act of Congress, passed a law as follows:

"All property real or personal which may hereafter be actually employed, within the limits of the District of Columbia, for manufacturing purposes shall be exempt from all general taxes for a period of ten years from the date of this act going into effect; 'provided that the value of the property so employed for manufacturing purposes shall not be less than five thousand dollars.'"

On June 20, 1894, Congress passed another act as follows:

"That for the support of the government of the District of Columbia, and maintaining the credit thereof, for the fiscal year, ending June 30, 1895, there shall be levied on all real estate in said District, except that belonging to the United States, and the District of Columbia, and that used for educational and charitable purposes, the following taxes, namely:"

It will be noticed that this is very similar to section 3744 of Mississippi Code 1892, specifying what property should be exempt from taxation.

In that case this court held that the special act had been repealed by the later general act, and says:

"It has been frequently held that the incorporation of a company by special charter, with the exemption of its lands or other property from taxation, creates, upon the acceptance of the charter, a contract which will insure that exemption during the period specified. But the present case does not come within that rule. It does not create a contract in the sense that it cannot be repealed. This is a bounty law which is good as long as it remains unrepealed; but there is no pledge that it shall not be repealed at any time."

Welch *vs.* Cook, 97 U. S., 541 to 542.

This is in exact accordance with the Mississippi Mills case and also with the opinion in the case of Adams *vs.* Tombigbee Mills, both of which hold that under the constitution of 1869 it was competent for the legislature to grant exemptions or bounties to certain classes, property or certain enterprises, whether they belonged to private corporations or individuals, but that it was not competent under said constitution for the legislature to grant an exemption in a charter to a particular corporation for the simple and unanswerable reason that if good at all it would be a contract and irrevocable, a thing which section 13 of article 12 of said constitution expressly prohibits.

So that on this question the supreme court of Mississippi is not giving any new phase to the question or announcing any new rule, but is simply giving a correct construction of the Mississippi Mills case and a construction exactly in accordance with the rulings of this court. (See opinion in Record, p. 668 to 669.)

This court has, in four concurring opinions, held that,

under provisions the same as or similar to section 13 of article 12 of Mississippi constitution of 1869, the legislature could not grant exemptions from taxation to particular corporations.

Louisville *vs.* Palmes, 109 U. S., 248.
St. Louis, &c., *vs.* Berry, 113 U. S., 475.
Schurz *vs.* Cook, 148 U. S., 408.
Keokuk *vs.* Mo., 152 U. S., 303 and 310 to 312.

In regard to any claim of innocent purchaser or estoppel, we have shown in a previous part of this brief that the plaintiffs in error are in no condition to set up any such claim, because this suit is for current taxes, and they admit that they had the money in hand with which to pay the same. Their only excuse is that notwithstanding the litigation they believed that the court would finally decide in their favor.

But, outside of that, it has been universally held that the claim of the State for its taxes cannot be defeated by any claims of laches, estoppel, or innocent purchaser.

Kansas City, &c., *vs.* Hannibal, 81 Mo., 290 to 291.
Delaware *vs.* Commonwealth, 50 Pa. St., 407 to 408.
2d Thompson Com. Law Corp's, sec. 2825.
Winona *vs.* Minnesota, 159 U. S., 528 to 529.
4 Ed. Blackwell Tax T., p. 184 to 186.
State *vs.* Brewer, 64 Ala., 298 to 299.
Perry *vs.* Selma, 65 Ala., 391.
Vicksburg, &c., *vs.* Denny, 116 U. S., 665.
Yazoo, &c., *vs.* Thomas, 132 U. S., 185.

Read especially above reference in Blackwell.

And in the latest decision on this point this court, in regard to writs of error to a State court, decided as follows:

"Besides, whether a party in a case has been given or refused the benefit of the law of estoppel, involves no Federal question."

Weyerhaueser *vs.* Minn., 176 U. S., 558 to 559.
Central Land Co. *vs.* Laidley, 159 U. S., 109 to 112.

We wish the court to distinctly understand that in the Lambert case the railroad was sold to the Louisville, New Orleans and Texas Railway Company in 1890, but that the railroad company did not at that time sell itself. It continued in existence, and in the Lambert case, in 70 Miss., 779, the bill was filed by the Natchez, Jackson and Columbus Railroad Company in its own proper name to have the taxes due on the property applied to the construction debts or bondholders, so as to get a dividend on its stock.

The case at bar is entirely dissimilar, in that the declaration alleges that on October 24, 1892, "the said Louisville, New Orleans and Texas Railway Co. then and there surrendered its franchise, and then and there became extinct and ceased to exist as a corporation."

Record, p. 5.

This is a suit for the current and not back taxes. The litigation has been going on so long and has been so protracted that we wish to keep this court from being misled, and to bear in mind that it is a suit for current taxes and against the parties who ought to have paid the taxes. All

the above pleadings which we have quoted and referred to show that it is these same plaintiffs in error who have made the appropriations, made the affidavits, and have gotten the sheriffs' receipts, and hence it is impossible that they could have presumed that the taxes had been paid in money. They knew the fact, and that they had attempted to pay with the affidavits and not with money. We hope the court will not be misled on this point.

Some point is made about the supreme court of the State changing its opinion and overruling former decisions, but in regard to that this court says:

"If the highest judicial tribunal of a State adopt new views, and reverse its former decisions, this court will still follow the latest settled adjudication."

Leffingwell *vs.* Warren, 2 Black, 599, 603.
Moores *vs.* Nat. Bk., 104 U. S., 625, 629.
State *vs.* Wisconsin, 194 U. S., 181 to 183.
Hansford *vs.* Davis, 163 U. S., 278 to 279.

As to the appendix attached to the brief of opposite counsel showing various exemptions to corporations, we call attention to the appendix in our last brief on the merits filed in October, 1900, and entitled "supplemental brief for defendant in error and in reply to supplemental brief of plaintiff in error," to show that in a large number of cases there were no exceptions granted and that there was no uniformity or equality in those that were granted.

For a further discussion of the points that the exemption was void *ab initio* under sections 13 and 20 of article 12 of the Mississippi constitution of December 1, 1869, we respect-

fully refer this court to the opinion of the supreme court of Mississippi. It is so exhaustive and conclusive that we feel unable to add anything to its great force and clearness. It is found in Record, p. 659 to 671; 77 Miss., 270 to 289.

Respectfully submitted.

F. A. Critz,
Marcellus Green,
R. C. Beckett,
Counsel for Defendant in Error.